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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 902

TRAVEL CONSULTANTS, INC., *Petitioner*,

v.

TRAVEL MANAGEMENT CORP., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Travel Consultants, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on September 28, 1966.

CITATION TO OPINION BELOW

The District Court for the District of Columbia filed no opinion in this case. The opinion of the Circuit Court of Appeals is printed in Appendix A hereto *(infra* pp. 1a-8a) and is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Under the United States Arbitration Act, must the District Court itself hear and determine the question whether the issues presented by litigation before it are contractually subject to binding arbitration; or may the District Court refer that question to the arbitration proceeding for determination?

2. Under § 3 of the United States Arbitration Act, is a party which has breached a contract containing an arbitration provision entitled to a stay, pending arbitration, of a court action for an accounting and damages based upon that breach, notwithstanding the breach; or does the breach constitute a "default in proceeding with such arbitration" which precludes such a stay?

3. Under § 3 of the United States Arbitration Act, when grounds exist at law or in equity for the revocation of a contract containing an arbitration provision, may the District Court summarily stay litigation of the contract pending arbitration over the objection of the party in whose favor the grounds exist, and without determining the validity of those grounds?

4. When arbitration proceedings involve controlling issues identical with issues pending before the District Court in an action between the same parties and not subject to arbitration, should the District Court enjoin

the arbitration proceedings pendente lite notwithstanding the provisions of the United States Arbitration Act?

STATUTE INVOLVED

The statutory provisions involved are sections 2 and 3 of the United States Arbitration Act, 61 Stat. 669, 9 U.S.C. §§ 2 and 3. They are printed in Appendix B *(infra,* pp. 8a-9a).

STATEMENT OF THE CASE

a. Summary

This petition seeks interlocutory review of the denial of a preliminary injunction pendente lite against an arbitration proceeding. Petitioner is a small, locally-owned, District of Columbia travel agency. Respondent, a Delaware corporation authorized to do business in the District of Columbia, is a combination of various travel agencies. Petitioner and respondent are involved in a dispute relating principally to three written contracts they simultaneously entered into so as to correlate their respective travel businesses. Their dispute culminated when the respondent filed a specific performance action against the petitioner in the United States District Court for the District of Columbia on one of the contracts, and on the same day pursuant to another of the contracts instituted arbitration proceedings against the petitioner with the American Arbitration Association. Aspects of this dispute involving crucial common issues were thus brought before two separate tribunals, where they are presently pending.

The petitioner is seeking to bring the entire dispute before a single forum—either the court or the arbitrator—so as to obtain a fair, equitable, complete, and final

resolution of it and to avoid the intolerably wasteful and damaging burdens of unnecessary and harassing double litigation which threatens to be wholly disruptive of petitioner's business. To these ends, and because petitioner contends that it is not bound by any existing contract to submit to the projected arbitration and has a constitutional right to have the whole dispute tried and determined by the District Court, the petitioner seasonably moved in the District Court for a preliminary injunction staying the arbitration proceedings pendente lite. The District Court denied petitioner's motion, and on respondent's motion stayed, pending arbitration, the second defense and counterclaim that petitioner had filed in respondent's action against it. This order was affirmed on September 28, 1966, by the United States Court of Appeals for the District of Columbia Circuit, insofar as that court determined it had interlocutory appellate jurisdiction to review it. The arbitration proceeding remains in abeyance, awaiting a ruling upon this petition by this court.

b. The contractual arrangements

On August 7, 1962, the petitioner, the respondent, and petitioner's founder and principal employee, N. Sidney Nyhus, entered into a series of related and interdependent agreements whereby these three parties sought to coordinate their business activities under the executive direction of Mr. Nyhus, an expert in the travel field with unique qualifications to perform this function (R. 37). The principal agreements involved were a stock purchase agreement (R. 6), a sales agreement (R. 17), and an employment agreement (R. 22). In the stock purchase agreement, petitioner agreed to purchase from time to time a total of 50,000 shares of

respondent's common stock for $100,000, with the timing of the purchases made dependent upon the amount of petitioner's annual profits. By the sales agreement, respondent was made petitioner's exclusive agent to make all arrangements for foreign land travel of petitioner's travel customers, with provision for the respondent to share in petitioner's profits. Under the employment agreement, Mr. Nyhus was hired by respondent on a full-time basis to conduct respondent's business and perform respondent's obligations under the sales agreement.

The sales agreement contains this arbitration clause:

> 10. Any controversy or claim arising out of, or in connection with this Agreement or the breach thereof, shall be determined by arbitration pursuant to the rules then obtaining of the American Arbitration Association and the laws of the District of Columbia. Such arbitration shall be held in the District of Columbia.

The other agreements contain no arbitration clause (R. 48).

c. The District Court action

On August 3, 1965, respondent brought the present action in the District Court for specific performance of the stock purchase agreement, alleging that petitioner had defaulted in its installment payments and that respondent had no adequate remedy at law (R. 3). On the same day, respondent also instituted arbitration proceedings against the petitioner under the sales agreement, alleging various breaches of the agreement and seeking an accounting, damages and specific performance (R. 29).

In the court action, petitioner's answer (R. 14) denied that respondent was entitled to specific performance of the stock purchase agreement. Petitioner's answer included a "second defense and counterclaim" (R. 15) which alleged that the three agreements of August 7, 1962, were "in the contemplation of the parties, as well as in practical operating fact, interdependent, and each was entered into in consideration of and reliance upon the other two agreements, as part of a unitary, contractual undertaking by the signatories thereto." The petitioner particularly averred that the sales agreement was commercially impossible of performance by the respondent but for the coordinated administration of it through the personal services of Mr. Nyhus, as provided by the employment agreement, because of Mr. Nyhus' specific familiarity and expertness in its business operations; and that the stock purchase agreement looked to the petitioner's profits from the combined consolidated operations with the respondent under Mr. Nyhus' executive direction, as both a source of funds for the petitioner's purchase of stock and the measure of petitioner's obligation to make certain purchases. The petitioner also averred that the parties performed their respective obligations under these three interdependent agreements until the employment agreement was terminated by the mutual consent of the respondent and Mr. Nyhus on May 31, 1964, and that thereafter the respondent was unable to and did not perform its obligations to the petitioner under the sales agreement, to the petitioner's damage, and the obligations of the petitioner to purchase respondent's capital stock pursuant to the stock purchase agreement abated and terminated. Finally the petitioner averred that the principal issues involved in the

arbitration proceeding are identical with those arising under the complaint and petitioner's counterclaim so that the arbitration proceeding should be stayed during the pendency of the action.

As counterclaimant, petitioner prayed for an accounting between the parties "so that their respective obligations to one another under the stock purchase agreement and the sales agreement and the termination of said agreements may be fully determined and adjudicated;" that the petitioner be awarded damages for respondent's nonperformance of its obligations under the sales agreement; that respondent be restrained from taking any further action seeking to enforce the stock purchase agreement and the sales agreement; and for general equitable relief (R. 16-17).

d. Petitioner's motion for a preliminary injunction

Petitioner promptly requested the arbitration tribunal to stay the arbitration, pending disposition of the District Court proceedings. The arbitration tribunal advised the parties that after reviewing their contentions it had "determined that an issue as to arbitrability exists which must be determined either by an arbitrator or by the courts" and that it would proceed with the arbitration of this question unless respondent were stayed by court order (R. 41). Accordingly, petitioner promptly moved for a preliminary injunction staying and suspending pendente lite the arbitration proceedings (R. 33). An affidavit by Mr. Nyhus (R. 34) verifying petitioner's counterclaim, was filed in support of the motion together with a detailed affidavit of petitioner's president (R. 36) showing the irreparable injury which the simultaneous arbitration and

litigation of identical critical issues would inflict upon the petitioner. No counter-affidavits were filed by respondent.

e. Respondent's motion to stay petitioner's second defense and counterclaim, pending arbitration

Respondent moved for an order staying proceedings on petitioner's second defense and counterclaim "insofar as it raises issues, claims and controversies under the sales agreement . . . pending determination by arbitration of issues, claims and controversies thereunder, in accordance with the arbitration agreement contained in the sales agreement" (R. 32) basing its motion upon section 3 of the United States Arbitration Act (9 U.S.C. § 3). Although the motion was grounded upon the arbitration clause hereinbefore cited, no supporting affidavits were filed and no showing was made that the arbitration clause or indeed the sales agreement itself represented an existing contract surviving the respondent's own breach and repudiation, and currently binding the petitioner to arbitrate at the respondent's election. Moreover, the respondent did not dispute that the impending arbitration was directed to the question of arbitrability.

f. The District Court's findings, conclusions and order

On November 23, 1965, after hearing arguments but receiving no evidence apart from petitioner's affidavits above referred to, the court entered its findings of fact and conclusions of law (R. 42). It made no findings of fact with respect to the controverted questions put in issue by the petitioner's second defense and counterclaim, including the issues of interdependence and termination of the sales agreement. It found the respondent not to be in default in proceeding with the

arbitration of the sales agreement and that no irreparable harm would be suffered by the petitioner through the enforcement of the agreement for arbitration contained in the sales agreement. In its conclusions of law the court ruled that the allegations of petitioner's second defense and counterclaim relating to interdependence and terminability of the sales agreement and the stock-purchase agreement are at variance with the written contract; that respondent is entitled to a stay of proceedings, pursuant to section 3 of the United States Arbitration Act on appellant's second defense and counterclaim insofar as it raises issues under the sales agreement; and that petitioner's motion for a preliminary injunction is "without merit" (R. 42-44).

The District Court filed no opinion nor did it cite any legal authority for its findings, conclusions, and order, except for the United States Arbitration Act itself.

g. The Court of Appeals decision

On September 28, 1966, the Court of Appeals affirmed the action of the District Court in denying petitioner's motion to enjoin arbitration and in staying proceedings on petitioner's counterclaim, pending arbitration under the sales agreement (R. 47). However the Court of Appeals held that it lacked jurisdiction to review, as an interlocutory matter, the District Court's decision insofar as it stayed petitioner's defense to respondent's action for specific performance of the stock purchase agreement. The Court of Appeals opinion deals in major part with the jurisdictional question, and no precedents are cited in connection with the substantial points raised by the appeal. Parsing the contracts in

issue, the Court of Appeals held that whether the agreements be independent or interdependent is immaterial for purposes of determining whether petitioner is bound to arbitrate. With respect to the burden on petitioner of pursuing two actions concurrently in two different forums, it held that the burden falls upon petitioner because it signed two different agreements with the same party, one requiring arbitration and the other containing no arbitration provision. Stating that the respondent "shouldered the burden voluntarily" when it signed the agreements in question, the Court of Appeals could "see no basis for judicial interposition."

REASONS FOR GRANTING THE WRIT

1. The decision of the court below directly conflicts with controlling decisions of this Court construing the United States Arbitration Act. The arbitration sought to be enjoined by petitioner is for the express purpose of determining the arbitrability of a controversy between the parties. This Court has repeatedly held that the arbitrability of a controversy is to be resolved by the courts, and not by the arbitrator. Whether or not a party is bound to arbitrate, as well as what issues it must arbitrate, are matters to be determined by the courts on the basis of the contract entered into by the party, and are not matters to be determined by the arbitrator. See *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 546-547 (1964); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). See also *Necchi* v. *Necchi Sewing Machine Sales Corp.*, 348 F. 2d 693 (2d Cir. 1965) certiorari denied 383 U.S. 909. Moreover, this Court has also held that a party cannot be required to submit to arbitration any dispute which it

is not contractually bound so to submit. See *Atkinson, supra.* Despite these settled rules, the court below, by summarily denying the petitioner a preliminary injunction and staying petitioner's second defense and counterclaim, compelled arbitration without first trying and determining two essential questions: (a) Whether the contract under which arbitration is sought, and which petitioner asserts to be defunct, has survived respondent's breach so as to be enforcible by respondent through arbitration proceedings; and (b) If the arbitration contract be not defunct, what issues are encompassed by it.

2. The decision of the court below is in direct conflict with the decision of the Seventh Circuit in *Cuneo Press* v. *Kokomo Paper Handlers Union No. 34,* 235 F. 2d 108 (1956) certiorari denied 352 U.S. 912. In practical effect, it gives the respondent specific enforcement of a contract which the respondent has breached and holds the respondent to be entitled to arbitration irrespective of any question of respondent's breach. In the *Cuneo* case, breach of the contract was held to debar the party guilty of the breach from any right to a stay pursuant to § 3 of the United States Arbitration Act of a suit brought against it on the contract for an injunction and damages occasioned by the breach. Here, the courts below did not illuminate the bases for their decisions on the substantive issues which they ruled upon by the citation of any authority or by the elaboration of their legal reasoning. However, their summary denial of petitioner's motion for preliminary injunction and their stay of petitioner's second defense and counterclaim necessarily involved the determination that the respondent was entitled to equitable relief tantamount to specific performance of the arbitration

contract despite its breach thereof as averred by the petitioner and supported by petitioner's uncontroverted affidavits.

The *Cuneo* decision also required the party seeking enforcement of rights under the arbitration provision to make an affirmative showing that it was "not in default" and held that a mere recital to that effect was ineffective to serve as such a showing. In the present case, the respondent made no showing whatever in this respect.

3. The decision of the court below is also in direct conflict with the Second Circuit decision in *El Hoss Engineering and Transportation Co.* v. *American Independent Oil Co.*, 289 F. 2d 346 (1961) certiorari denied 368 U.S. 837 where the Court of Appeals held that the parties were entitled to a full trial to determine whether contractual relationships existing between them subjected their controversy to compulsory arbitration. In the instant case there was no trial whatever. Instead there was a summary ruling sustaining arbitration despite the existence of a substantial factual dispute about the true intention of the parties with respect to arbitration as that intention is evidenced by the contract containing the arbitration clause, and by the circumstances attending its execution. From the terms of the contract, it seems reasonable to believe that the parties intended only to resort to arbitration in lieu of litigation, and to do so for the obvious purpose of eliminating its concomitant burdens. The contract does not provide for particularly qualified arbitrators gifted with special commercial insights relevant to the solution of problems anticipated to arise under the contract: it provides for a referee, not for an expert. Nothing in the contract suggests that the parties intended to re-

sort to arbitration in addition to litigation, and thus to incur additional burdens. Moreover the absence of the arbitration clause from the other simultaneously executed contracts tends to evidence an intent to limit the scope of arbitration so that it would not encompass issues transcending the sales agreement.

4. The decision of the court below also conflicts with the decision of the Fourth Circuit in *Leesona Corp.* v. *Cotwool Mfg. Corp.*, 315 F. 2d 538 (1963) sustaining the grant of a preliminary injunction pendente lite against an arbitration proceeding which would have adjudicated issues between parties to the litigation identical with the issues pending before the trial court. The petitioner placed principal reliance upon the *Leesona* case in the court below, in part because the "staunch, practical reason" which justified the injunction pendente lite against the parallel and duplicative arbitration proceeding in *Leesona* is here present: "The ruling of the . . . Federal Court . . . [upon issues also involved in the arbitration] will be highly persuasive, if not dispositive, in the decision of the arbitrator." (315 F. 2d at 541.)

By failing to deal with the unitary controversy between the petitioner and the respondent as a matter calling for the careful exercise of the court's conventional equity jurisdiction to determine the parties' respective rights in an orderly and dispositive manner before a single tribunal, and by permitting the respondent to proceed against the petitioner so as simultaneously to arbitrate and to litigate the same issues and thus proliferate and compound the controversy, the court below departed sharply from the ruling in *Leesona*. It did not give proper weight to those traditional

and overriding principles of equity jurisprudence which require a more condign and less oppressive and wasteful procedure. Here, the court below failed to recognize the essential characteristics of the United States Arbitration Act as a procedural dispensation conferring equitable powers upon the court, to be exercised consistently with traditional principles of equity, and giving rise to procedural rights which yield to countervailing equities.

As the Chief Justice and Mr. Justice Black pointed out in their concurring opinion in *Moseley* v. *Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963), in construing the United States Arbitration Act the Court has left open a question of great importance: "Can any person, before any dispute has arisen, agree to arbitrate all future disputes he may have and thereby lose his right to go to court to try his claim according to due process of law?" (374 U.S. at 172-173). Important aspects of that question are presented by this petition. Because the United States Arbitration Act enables the courts to grant effective enforcement to contracts which would substitute private determinations for the regular procedures of the law which are guaranteed by the United States Constitution—e.g., due process and trial by jury—the Act should be strictly construed and must be administered consistently with established equity jurisprudence. In the present case the court below did neither. Instead it extended the Act so as to cover matters other than those certainly bargained for and so as to reach a result inconsistent with the intent of the parties at the time of the bargain. On these points also, the decision below is in conflict with *Leesona*.

CONCLUSION

In the court below, the respondent relied principally upon *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2d Cir. 1959) as requiring the denial of petitioner's motion for a preliminary injunction and the staying of petitioner's second defense and counterclaim. The *Robert Lawrence* case is directly in conflict with the Sixth Circuit decision in *American Airlines, Inc.* v. *Louisville and Jefferson County Air Board*, 269 F. 2d 811 (1959), a case upon which the petitioner relied in the court below, and with *Ross* v. *Twentieth Century—Fox Film Corp.*, 236 F. 2d 632 (9th Cir. 1956). Moreover, the *Robert Lawrence* case is persuasive authority for the proposition that this Court should grant the instant petition: it granted certiorari in the *Robert Lawrence* case (362 U.S. 909) only to have the petition dismissed by stipulation of the parties pursuant to Rule 60 (364 U.S. 801). If the *Robert Lawrence* precedent supports the decision of the court below, then the same important, fundamental questions of the constitutionality, construction, and application of the United States Arbitration Act presented by that case are involved in this case, and still await authoritative decision by this court. See *Moseley* v. *Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963). Accordingly, and for the reasons hereinbefore set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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